N A R U C
National Association of Regulatory Utility Commissioners

November 1, 2001

Magalie Roman Salas
Secretary
Federal Communications Commission
455 12th Street, SW Portals II Building
Washington, DC 20544

RE: ***In the Matter of Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information;*** **(CC Docket No. 96-115)** ***Implementation of the Non-AccountingSafeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended*** **(CC Docket No. 96-149)**

Ms. Salas,

The National Association of Regulatory Utility Commissioners (NARUC) files these brief comments in response to the FCC notice in the above-captioned proceeding. NARUC may well file more extensive comments on reply as this proceeding is slated for discussion at NARUC's upcoming November Convention in Philadelphia.

In 1996, the FCC initiated a rulemaking to address the obligation of carriers under § 222 of the Act.[1] The Commission subsequently released the *CPNI Order* on February 26, 1998 which *says* § 222(c)(1) allows a carrier to use, without the customer's prior approval, the customer's CPNI derived from the complete service that the customer subscribes to from that carrier and its affiliates, for marketing purposes within the existing service relationship.[2] The FCC also concluded that carriers must notify the customer of the customer's rights under the section and then obtain express written, oral or electronic customer approval -- a "notice and opt-in" approach -- before a carrier may use CPNI to market services outside the customer's existing service relationship with that carrier.[3] U S West appealed to the Tenth Circuit. The FCC's August 16, 1999 reconsideration order retained the opt-in approach. Ultimately, the Tenth Circuit vacated a portion of the *CPNI Order*,[4] contending the opt-in approach violates the First and Fifth Amendments of the Constitution.[5] The court declined to review the Commission's opt-in approach under the traditional administrative law standards of *Chevron*,[6] in light of what it

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1 Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, *Notice of Proposed Rulemaking, CC Docket No. 96-115, 11 FCC Rcd 12513 (1996).*

2 CPNI Order, *13 FCC Rcd at 8080, 8083-84, 8087-88, paras. 23-24, 30, 35.*

3 Id. *at 8127-45, paras. 86–107;* see also U S WEST v. FCC, *182 F.3d at 1230.* This approach is distinguished from an "opt-out" or negative option approach "in which approval would be inferred from the customer-carrier relationship unless the customer specifically requested that his or her CPNI be restricted."

4 *U S WEST v. FCC*, 182 F.3d at 1240.

5 Id. *at 1231.*

6 See *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

perceived as the "serious constitutional questions" raised by the approach, and determined that it must be reviewed under the constitutional standards applicable to regulations of commercial speech concluding, *inter alia*, that the government did not demonstrate that the CPNI regulations requiring opt-in customer approval "directly and materially advanc[ed] its interests in protecting privacy and promoting competition." The court concluded that the Commission's determination that an opt-in requirement would best protect a consumer's privacy interests was not narrowly tailored because the Commission had failed to adequately consider an opt-out option. The court stated that an opt-out option should have been more fully investigated as it is inherently less restrictive of speech. In vacating portions of the *CPNI Order*, the court did not require the Commission to find specifically that the opt-out option was the correct approach. Instead, it found fault with the Commission's "inadequate consideration of the approval mechanism alternatives in light of the First Amendment."

The instant further notice seeks comment, *inter alia*, on any potential harms that may arise from adopting either an opt-out or opt-in approach and asks parties to address the relative costs and convenience of CPNI use under both opt-in and opt-out approaches.

NARUC supported the FCC on appeal contending that it was inappropriate for the 10th Circuit to apply a 1st amendment analysis to carrier's use of CPNI. We contended that the FCC's original CPNI Order was narrowly tailored and that the existing administrative record convincingly demonstrates that, of the limited options available to the FCC, the opt-in method of obtaining customer approval was the most reasonable solution. As the FCC concluded in the CPNI Order, the method of implied approval suggested by U.S. West (i.e., the opt-out method) did not ensure that the Congressional goal of informed customer consent would be satisfied. As for the two express methods of approval available to it, the FCC chose the least restrictive method available. As referenced earlier, NARUC will be examining its current position in light of this further NPRM and may file more extensive comments during the reply phase of this proceeding.

Respectfully Submitted,

JAMES BRADFORD RAMSAY
General Counsel